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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 282

JAMES BLAIR BARNES, JR.,
Petitioner,

v.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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JAMES ELLIS BAINES, JR.,

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CITY OF BIRMINGHAM, ALABAMA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama, unreported at this time, is appended at 1a. Petition for rehearing was denied without opinion by order appended at 10a. Certiorari was denied by the Supreme Court of Alabama without opinion by order appended at 11a.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on June 16, 1970. A timely petition for rehearing was filed and denied without opinion on June

30, 1970. A Petition for Writ of Certiorari was filed with the Supreme Court of Alabama and denied without opinion on August 6, 1970.

The jurisdiction of this Court is founded on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does *Birmingham, Ala. City Code* § 14-13 (1964) violate the first and fourteenth amendments, particularly by its allowing policemen to "prohibit . . . persons from occupying . . . any public place where . . . disorder . . . is believed by the chief of police likely to occur . . ."?

2. May a municipality, consistently with the first and fourteenth amendments, deny to its citizens the use of public parks or streets based upon the belief of the chief of police or other police officer that an unlawful assembly is planned to be held?

3. May a municipality, consistently with the first and fourteenth amendments, deny to its citizens the use of public parks or streets based upon the belief of the chief of police or other police officer that it is necessary to prevent a breach of the peace, a disorder, or a riot?

4. May a municipality, consistently with the first and fourteenth amendments, allow an otherwise peaceable assembly to be disrupted by hecklers, during which time the police are present in sufficient numbers to control the assembly and the hecklers, and then undertake to deprive the assemblers of the use of the public park?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutionality of *Birmingham, Ala. Code* § 14-13 (1964) is involved:

> Whenever the chief of police has good reason to believe that an unlawful assembly on a street or in a public place is in progress or is planned to be held, the chief of police, if he has good reason to believe that it is necessary to prevent a breach of the peace, a disorder or a riot, may prohibit, for the time being, persons from occupying or passing on any street or public place where such breach of the peace, disorder or riot is threatened, or is believed by the chief of police likely to occur, and to otherwise regulate passage or occupancy upon such street and place.
>
> The chief of police, or in his absence, the officer mentioned in section 14-16, may deputize any member of the police department to impose the prohibitions or regulations upon occupying or passing on streets or public places hereinabove provided for. No person, after being duly informed of such prohibition or regulation, shall wilfully and intentionally, without lawful excuse, attempt to go after being warned not to do so, or remain on any such street or public place and fail to depart after being warned to do so. (Ord. No. 63-17, § 12.)

Ala. Code tit. 14, § 407 (1958) provides the definition of unlawful assembly:

> If two or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall, on conviction, be punished, at the discretion of the jury, by fine and imprisonment in the county jail, or hard labor for the county, for not more than six months.

In order that the ordinance may be considered in its full context, and for reference to definitions of other terms, the remainder of article I of chapter 14 (§§ 14-1

through 14-16) of the Birmingham City Code is appended at 12a.

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

On Sunday afternoon, September 10, 1967, the petitioner ("defendant") and some 50 or 60 of his friends and acquaintances gathered in Woodrow Wilson Park, a public park located between the Court House and the City Hall. The purpose of the event was described by the defendant as a "peace love-in." (R. 84)[1] Some of the group carried signs protesting the Vietnam War. Most of the group was dressed in "hippie" attire. Their hair was long, their dress was bizarre, and some were barefooted. (R. 19)

[1] References are to the record prepared for the Court of Criminal Appeals.

In the early part of the afternoon the group of war protestors sang songs and a friendly dialogue took place with curious spectators. (R. 105) As the spectators grew in numbers they began to heckle the protestors. By this time Lt. Long of the Birmingham police had arrived. He could discern two distinct groups: the protestors gathered around and on the Confederate War Memorial, and, surrounding them, a group of mainly hostile spectators. (R. 19-20)

The hecklers' expressions of contempt for the war protestors picked up with the arrival of one David Mazer. (R. 51) Lt. Long testified that Mazer was the most outspoken of the hecklers. Indeed Mazer's wife became so concerned over her husband's emotional behavior that she asked Lt. Long to remove her husband. Long took no action on the request. Long admitted that Mazer "appear[ed] to be emotionally disturbed" and that he had seen Mazer lose complete control of himself. (R. 52) Long further admitted that he heard Mazer use profanity in the course of his tirade, that this was a violation of the City Code, but Long made no arrests. *(Id.)*

At one point Lt. Long, using a bullhorn, "asked" everyone not a part of the war protestors' gathering to leave the park. No one left but no one was arrested. (R. 50) Beyond requesting the hecklers to leave, the police's effort to control the mob that threatened to set upon the protestors consisted of advice offered by Officer Trucks to two servicemen to leave the park and not get into any trouble. (R. 69)

Lt. Long never physically interposed himself between the two opposing groups. No arrests were made for specific acts of misconduct. It was not until Mazer had been allowed to continue screaming epithets (*e.g.*, "yellow-

beli·ed Communists" (R. 40, 52, 71)) that Lt. Long gave his second and final order to disperse. This time everyone was told to leave. The defendant was arrested as he sought to discuss his constitutional rights with Lt. Long.

The Raising of the Federal Questions

The City's complaint in Circuit Court appears to rely on the several propositions asserted herein as violating the first and fourteenth amendments. It is quoted in full at the beginning of the Court of Criminal Appeals' opinion, 1a-2a.

Defendant filed a demurrer and a motion to quash the complaint, challenging § 14-13 as contravening the first and fourteenth amendments on vagueness grounds and "as a deprivation of the defendant's rights of free speech and assembly. . . ." (R. 3-5) The trial court overruled the demurrer and the motion to quash (R. 6) and these rulings were among the errors assigned on appeal (see Brief for the Appellant in the Court of Criminal Appeals at 15).

Defendant pleaded not guilty and demanded a trial by jury.

In charging the jury defendant requested the court to instruct the jury that the police had a duty to protect those peaceably assembled from persons who would create a disturbance. The requested charge was refused. (R. 9, 128) The failure to give this instruction was among the errors assigned on appeal (see Brief for Appellant in the Court of Criminal Appeals at 31).

The jury found the defendant guilty. He was fined $100 and sentenced to ninety days in the Birmingham jail.

The Court of Criminal Appeals affirmed the conviction. On the issue of facial unconstitutionality of § 14-13 (argued in Brief for the Appellant at 21-29) the court gave the ordinance a narrow "as-applied" review:

> Whenever, as was done here, a police officer gives a prospective unlawful assembler a reasonable opportunity to disperse, the problem of making the policeman an ad hoc judge is reduced to an examination of the lawfulness of the assembly. (6a)

As to defendant's requested charge No. 4[2] the court somehow found that the charge did not "predicate the right upon the jury's finding the assembly to be peaceable." (8a)

REASONS FOR GRANTING THE WRIT

I.

In upholding the constitutionality of § 14-13 the opinion of the Court of Criminal Appeals of Alabama directly conflicts with the decisions of this Court.

Chapter 14 of the Birmingham City Code is a compendium of various suppressive measures designed to interfere with the rights of free assembly. Portions of the Chapter have been before the Court in cases arising out of Civil Rights activities. For example, Reverend Shuttlesworth was prosecuted under §§ 14-5, 14-6, and 14-7. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). In *Walker v. City of Birmingham*, 388 U.S. 307, 316 (1967), in commenting on the ordinance now codified as §§ 14-17 through 14-19, the Court said "The generality of

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[2] "I charge you ladies and gentlemen of the jury that the right to peaceably assemble in a public park is a right protected by law and it is the duty of the police to protect those in the exercise of such rights from persons who would create a disturbance." (R. 8-9)

the language contained in the Birmingham parade ordinance . . . would unquestionably raise substantial constitutional issues concerning some of its provisions."[3] This dictum became law when the ordinance was held unconstitutional in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

In unmistakable terms § 14-13 vests in the Chief of Police the authority to prohibit assemblies where he has "good reason to believe an unlawful assembly is in progress or is *planned to be held* . . ." or where a breach of the peace,[4] a disorder, or a riot "is believed by the chief of police *likely to occur* . . ." (emphasis added). Section 14-13 violates almost every rule in the area of free expression this Court has ever announced.

A striking vice is the element of prior restraint. "Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." *Carroll v. President & Commissioners*,

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[3] Mr. Chief Justice Warren, dissenting, noted: "The attitude of the city administration . . . [is] a matter of public record, of course, and [is] familiar to this Court from previous litigation." 388 U.S. at 325 n.1.

[4] *Birmingham City Code* § 16-2 defines this term in an unconstitutionally broad and vague manner:

> Any person who disturbs the peace of others by violent or offensive conduct, or carriage, or by loud or unusual noises, or by profane or obscene or offensive language, or any person who shall commit any act or diversion causing or tending to a breach of the peace, or any person who shall be guilty of lewd, immoral or indecent conduct, or any person who shall use any obscene or filthy language in a public place, or any person who shall commit any act or diversion tending to or calculated to debauch the morals of any person, shall be deemed guilty of disorderly conduct, and, upon conviction, shall be punished as provided in section 1-6.

"[T]ending to a breach of the peace" cannot stand alongside the declared unconstitutionality of "with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned . . ." Cox v. Louisiana, 379 U.S. 536, 551-52 (1965).

393 U.S. 175, 181 (1968). The elimination of prior restraints was a "leading purpose" in the adoption of the first amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938). The Court has repeatedly emphasized that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 382 U.S. 58, 70 (1963).

Another pervasive vice of § 14-13 is that it "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J. concurring); see *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J. concurring). The ordinance "bears the hallmark of a police state." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965). Section 14-13 vests in the Chief of Police uncontrolled discretion to allow or to suppress the rights of free expression. See, *e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Schneider v. New Jersey*, 308 U.S. 147 (1939). The Chief of Police, or a captain, or a lieutenant, has the discretion to suppress an assembly based on his unfounded "belief" that a pack of rowdies may disturb an otherwise peaceful assembly. He may also suppress an assembly because he fears that the contents of the speech may cause a hostile reaction. However, in the oft quoted words of *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949):

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and

> challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Under § 14-13, though, the extent to which a speaker or assembler is held accountable for the conduct of others regardless of his part in causing that conduct, is undefined and apparently unlimited.

The Court of Criminal Appeals did not cite or in any way allude to any of the controlling decisions of this Court. The state court gave § 14-13 a narrow "as-applied" construction and failed to "take into account possible applications of the statute in other factual contexts besides that at bar," *NAACP v. Button*, 371 U.S. 415 (1963). Moreover:

> An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).[5]

Even under the narrow "as-applied" analysis of the Court of Criminal Appeals, ignoring considerations of facial unconstitutionality, defendant's gathering in the park was far less disruptive or disorderly than the activity protected in such cases as *Cox v. Louisiana*, 379 U.S. 536 (1965) (defendant urging 2000 noisy demonstrators to "sit-in" which then (1961) would have vio-

[5] That the defendant himself was accused of uttering threats does not relieve the Court from the task of reviewing the validity of the ordinance. In Kunz v. New York, 340 U.S. 290 (1951), a statute was struck down for overbreadth and a conviction reversed although the petitioner may not have been engaged in privileged or protected conduct. See also Terminiello v. City of Chicago, 337 U.S. 1 (1949); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

lated trespass law); *Edwards v. South Carolina*, 372 U.S. 233 (1963) (" 'boisterous' 'loud' and 'flamboyant,' " ...ng," "stamping their feet and clapping their ... *Feiner v. New York*, 340 U.S. 315, 317 (1950) ...sing racially mixed crowd through a loudspeaker ...ently "endeavoring to arouse the Negro people against the whites . . .").

The "unlawful assembly" (defined by *Ala. Code* tit. 14, § 407 (1958)) foundation of § 14-13 is itself an instrument of suppression of unpopular causes. Reverend Fred Shuttlesworth, a civil rights leader, was prosecuted for taking part in an unlawful assembly. *Lewis v. Greyhound Corp.*, 199 F. Supp. 216 (M.D. Ala. 1963). Reverend Ralph David Abernathy was prosecuted for the same offense. *Abernathy v. State*, 275 Ala. 691, 155 So. 2d 592 (1962), *rev'd per curiam*, 380 U.S. 447 (1964). Civil rights demonstrators in Eufala, Alabama, were prosecuted under a city ordinance adopting tit. 14, § 407. *Cochran v. City of Eufala*, 251 F. Supp. 981 (M.D. Ala. 1966).

The "chilling effect" of § 14-13 on privileged activity is its most cancerous vice. Birmingham, perhaps more than other communities, needs the free and unfettered exchange of ideas and beliefs that title 14 is designed to forestall.

II.

The record reveals the complete failure of the police to attempt to restrain the mob that threatened to assault the protestors. If the situation did deteriorate, it was due to police inaction. Any "unlawfulness" was a creation of the police. The jury needed to be instructed that the police had a positive obligation to protect peaceful assemblers from those persons who would create a disturbance.

The officer in charge heard Mazer screaming profanities and did nothing. He "asked" the hecklers to leave at one point but he never sought to enforce this order. Mazer was never told to leave the park. He was never arrested—he was saying what the police were thinking. The police allowed the hecklers to continue until Lt. Long invoked § 14-13. This demonstrates the essential evil of § 14-13—it allows the police to use a general order to disperse rather than a specific arrest for a specific violation. The hecklers who wished to set upon the protestors resented their statements about the Vietnam war, just as in earlier years and in earlier cases in this Court hecklers were shouting down and beating down the seekers of racial justice.

Several cases contain references to the idea that the possibility of disruptive conduct by those who disagree with a speaker does not justify the suppression of the speech.[1] See, *e.g.*, *Bachellar v. Maryland*, 397 U.S. 564, 566-67 (1970); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969) (Black, J. concurring); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *Cox. v. Louisiana*, 379 U.S. 536, 551 (1965). *Cf. Cooper v. Aaron*, 358 U.S. 1, 16 (1958); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). But none of these cases presents the principle as a foremost ground for decision and it is still painfully true that "we find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder . . ." *Ferrell v. Dallas Independent School District*, 392 F.2d 697, 705 (5th Cir.) (Tuttle, J. dissenting), *cert. denied*, 393 U.S. 858 (1968).

[1] This traffic in ideas may be distinguished from the Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) problem of personal threats.

Certiorari should be granted to affirm emphatically that a hostile audience cannot circumvent the first amendment.

CONCLUSION

A writ of certiorari should be granted to consider the constitutionality of § 14-13 and to consider the issue of the consequences of a police inaction when peaceful assemblers are threatened by a hostile reaction.

Respectfully submitted,

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THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1969-70

6th Division

James Ellis Baines, Jr.

v.

City of Birmingham

Appeal from Jefferson Circuit Court

No. 29755

Decided June 16, 1970

CATES, JUDGE

Appeal from conviction of ordinance breach. Fine, $100.00 and 90 days in the Birmingham Jail were imposed.

The City's complaint in the Circuit Court was as follows:

> "* * * that James Ellis Baines, Jr. within twelve months before the beginning of this prosecution on, to-wit: September 10, 1967, and within the City of Birmingham at, to-wit: Woodrow Wilson Park, a public place, did take part in an

assembly which the officer then in command of Birmingham Police headquarters in City Hall, Lt. R. J. Long, had good reason to believe was an unlawful assembly, to-wit: an assembly of two or more persons who, with intent to carry out a common purpose, conducted themselves when assembled, so as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled, including defendant, would commit a breach of the peace *or provoke others to do so* and further said Lt. R. J. Long had good reason to believe that it was necessary in order to prevent a breach of the peace, a disorder or a riot to regulate passage or occupancy upon such place and did so by informing said James Ellis Baines, Jr., and others taking part in said assembly that said assembly was an unlawful assembly and that said persons engaged in said assembly, including said James Ellis Baines, Jr., would have to depart and said James Ellis Baines, Jr., after being informed that said assembly was unlawful and that he would have to depart did wilfully and intentionally, without lawful excuse, remain on said Woodrow Wilson Park and did fail to depart after being warned to do so, contrary to and in violation of Section 14-13 of the General City Code of Birmingham of 1964."

Lt. Long, the senior police officer present, testified that there were 200 to 300 people in Woodrow Wilson Park on the afternoon in question. About fifty were clustered with Baines about the base of the Confederate statute. Surrounding them were hecklers. There was apparent physical contact: "There was some pushing and shoving from both sides." (R. 20)

Baines was waiving a stick, offering to bash in the heads of some youthful hecklers. At one point he passed the stick over to Walker.

After Long ordered the crowd to disperse, Baines remained even after Long's subsequent orders to go.

§ 14-13, supra, reads as follows: -

> "Whenever the chief of police has good reason to believe that an unlawful assembly on a street or in a public place is in progress or is planned to be held, the chief of police, if he has good reason to believe that it is necessary to prevent a breach of the peace, a disorder or a riot, may prohibit, for the time being, persons from occupying or passing on any street or public place where such breach of the peace, disorder or riot is threatened or is believed by the chief of police likely to occur, and to otherwise regulate passage or occupancy upon such street and place.
> "The chief of police or, in his absence, the officer mentioned in section 14-16, may deputize any member of the police department to impose the prohibitions or regulations upon occupying or passing on streets or public places hereinabove provided for. No person, after being duly informed of such prohibition or regulation, shall wilfully and intentionally, without lawful excuse, attempt to go after being warned not to do so, or remain on any such street or public place and fail to depart after being warned to do so. (Ord. No. 63-17, § 12.)"

Coupled therewith in the same chapter, we find § 14-16:

> "In the absence of the chief of police from the police headquarters in the City Hall, the officer in command of headquarters in the absence of the chief of police shall have all authority conferred by any section of this chapter on the chief of police. In order to be absent within the meaning of this section, it shall not be necessary that the chief of police be absent from the city or that he be off duty. If he is not physically pres-

ent in police headquarters, then that officer in command of police headquarters while the chief of police is not present therein shall have all authority conferred by this chapter on the chief of police. (Ord. No. 63-17, § 12.)"

§ 14-1 defines an assemblage as unlawful as follows:

"Unlawful assembly. An assembly which is unlawful according to the common law of England, section 407, Title 14, Code of Alabama, or any other state act or statute. * * *"

Blackstone, citing Coke, says iv Comm. 146:

"An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it."

Code 1940, T. 14, § 407 reads:

"Unlawful assemblies.—If two or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall, on conviction, be punished, at the discretion of the jury, by fine and imprisonment in the county jail, or hard labor for the county, for not more than six months."

Thus § 407, supra, relaxing from "three or more" to "two or more" is in derogation[1] of the common law; but only as to one. Here there were more than two persons assembled.

The city has supplemented the appellant's statement of facts. Hence, we are entitled to glean (from the two statements of facts in the opposing briefs) the tendencies of the evidence supportive of the verdict; i.e. that appel-

[1] On principles of severability, we construe § 14-1 without reference to any Alabama statute.

As to proof of a lawful assembly turning into an unlawful one, there was evidence before the jury that when Lt. Long first appeared the pushing and shoving was already in progress. The tumult subsided for a while then broke out again.

One Mazer came into the park and seemed to lead the hecklers, though this was after Lt. Long's first reading the riot act to the crowd. It is inferable from the evidence that Baines (and probably Walker) replied in kind to Mazer's taunts. Certainly Baines had not left.

As to § 6 of the Annotation, supra, it would seem that Baines and backers—as well as the hecklers—alternated between lawful free speech and unlawful offers to do combat.

Accordingly, we consider that there was no error in overruling the demurrer to the City's complaint. We find no invidious prior restraint on free speech or assembly inherent in § 14-13.

Assignment of Error No. 3 complains that the trial court erred in overruling appellant's motion to suppress the City's evidence. Such a motion is unknown to our jurisprudence except as to unlawfully seized objects or possibly illegally obtained confessions.

Moreover, if it was meant to be a motion to exclude, the circuit judge correctly ruled that it came too late. *Taylor*, 15 Ala. App. 72, 72 So. 557; McElroy, *Law of Evidence in Ala.* (2d ed.), § 449.05.

Assignment of Error No. 4 relates to an *oral* request for a jury charge (R. 128). Under Code 1940, T. 7, § 273, tendered charges—as in Federal trials—must be in writing.

lant upon request refused to depart from the place of the gathering.

In this case appellant has assigned seven claims of error.

Assignments of error are mandatory in appeals from convictions of ordinance breaches. *Ray v. City of Prichard*, 45 Ala. App. 32, 222 So. 2d 345, cert. den. —— U. S.——.

The first two assignments complain of the overruling of a motion to quash the complaint and of demurrers thereto. Both these pleadings claim that § 14-13, quoted above, on its face proscribes free speech and public assembly and is void for vagueness. Overruling a motion to quash in a municipal case is not revisable on appeal. *Thomas v. City of Eufaula*, 44 Ala. App. 643, 218 So. 2d 813.

Whenever, as was done here, a police officer gives a prospective unlawful assembler a reasonable opportunity to disperse, the problem of making the policeman an ad hoc judge is reduced to an examination of the lawfulness of the assembly. C. f. *State v. Bulot*, 175 La. 21, 142 So. 787.

Using the outline employed in Anno, 71 A. L. R. 2d 875, we take up first the number proved to have made up the assembly after it became allegedly unlawful. Under whichever minimum number, i.e. two or three, there was evidence before the jury that during the pushing and shoving and Baines's stick waving there were at least three engaging in fighting or threatening to fight the hecklers.

This same evidence would support a common intent.

The fifth assignment complains of the form of guilty verdict. This although appellant did not tender such a form in writing along with his requested charges.

Moreover, it is abundantly clear that the court below told the jury that the form was but a shorthand rendition of all that was embraced in the charges given should they find beyond a reasonable doubt that Baines was guilty under all the evidence. The last of his direction reads:

> "THE COURT: All right. You, ladies and gentlemen, of course understand that the charge of the Court with respect to the various elements of guilt that I have given you, must be determined by you. The various things that I have charged you on, some several of them, that you must determine before you find the defendant guilty as charged. This is the form of the verdict, itself. It does not undertake to embrace all of the elements that would be involved in your making a determination of guilt or innocence. This is merely the form of finding the defendant guilty or not guilty.
>
> "All right. You may take the case."

Assignment of Error No. 6 relates to refused Charge No. 1:

> "Defendant's requested charge no. 1
>
> "I charge you ladies and gentlemen of the jury that unless you believe from the evidence that the Defendant gathered with two or more persons who shared a common intent to create a breach of the peace and did create a breach of the peace you cannot return a verdict of guilty."

This instruction would mislead a jury because, if for no other reason, it would burden the State with proving to the required degree that Baines "gathered" with the

others. Had it used "assembled" or "met" a more accurate legal concept would have been laid down. Also the charge ignores the circumstance of a peaceable assembly ab initio for a lawful purpose metamorphosing into an unlawful meeting.

Assignment No. 7 complains of the refusal of Charge No. 4:

> "Defendant's requested charge no. 4
>
> "I charge you ladies and gentlemen of the jury that the right to peaceably assemble in a public park is a right protected by law and it is the duty of the police to protect those in the exercise of such rights from persons who would create a disturbance."

This charge does not predicate the right upon the jury's finding the assembly to be peaceable. In *Abernathy v. Ala.*, 380 U.S. 447, the going about in a peaceful way, lawful conduct—though irritating to others—could not be the basis of incitement to a breach of the peace.

We distinguish the tendencies of the evidence here. Hence, Charge No. 4 was abstract.

The sufficiency of the evidence was not put to the trial court. That is, there was (1) no motion at the close of the City's evidence before the defendant presented his case for the court to exclude the City's evidence and discharge the jury with judgment sine die for the defendant; (2) no affirmative charge tendered in writing at the close of all the evidence; (3) nor any motion for new trial. *Gillogby*, 40 Ala. App. 640, 120 So. 2d 640; McElroy, *Law of Evidence in Ala.* (2d ed.), § 449.05.

In a public place one who chooses to stand his ground and fight where presumptively there is an avenue of peaceful retreat is in a poor posture to claim self defense.

In conclusion, taking the conflicting statements of facts in the briefs of both parties in the light most favorable to the prosecution, we consider the jury could have inferred that at the time of the *last* order to disperse Baines was participating in an unlawful assembly without cover of the First Amendment.

Since the statute of limitations has run on any State misdemeanor compassed in the same transaction, no problem arises under *Waller v. Florida*, —— U. S. —— No. 24, Oct. Term 1969) mss. April 6, 1970. We express no opinion as to whether *Waller* renders void § 36-56 of the Birmingham City Code. See also § 170, Cons. of Ala. 1901.

Having considered all appropriate assignments we find in them no error. The judgment below is due to be

AFFIRMED.

THE COURT OF CRIMINAL APPEALS
OF ALABAMA

6th Div. 6, Jefferson Circuit Court

James Ellis Baines, Jr., Appellant

vs.

City of Birmingham, Appellee.

Dear Sir: I beg to advise you as an attorney of record, that on June 30, 1970, the Court of Criminal Appeals rendered judgment of application for rehearing overruled in the above stated cause.

No opinion.

Montgomery, Ala., June 30, 1970

Yours truly,

CHARLES BRICKEN, JR.
Clerk.

OFFICE OF

CLERK OF THE SUPREME COURT

STATE OF ALABAMA

MONTGOMERY

Re: 6 Div. No. 803 Jefferson Circuit Court

Ex parte: James Ellis Baines, Jr., Appellant

Re: City of B'ham b. James Ellis Baines, Jr.

Re: City of B'ham

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * * *

x Petition for Writ of Certiorari to the Court of Criminal Appeals denied. No opinion.

s/ J. O. Sentell

Clerk, Supreme Court of Alabama

August 6, 1970

BIRMINGHAM, ALABAMA CITY CODE

CHAPTER 14.

DEMONSTRATIONS AND PUBLIC ASSEMBLIES[1]

Article I. In General.

§ 14-1. Definitions.

§ 14-2. Persons meeting to commit breach of the peace.

§ 14-3. Persons meeting to violate city laws.

§ 14-4. Soliciting persons to participate in parades, processions, etc.

§ 14-5. Obstructing free passage of streets.

§ 14-6. Refusal to move on after request by police officer.

§ 14-7. Lying prone on streets.

§ 14-8. Disturbing the peace while engaging in demonstrations.

§ 14-9. Demonstrations on sidewalks.

§ 14-10. Duty of police to order dispersal of unlawful assemblies.

§ 14-11. Failure to disperse from unlawful assembly.

§ 14-12. Duty to retire from assembly when missiles thrown at police.

§ 14-13. Authority to prohibit use of public places when disorder threatened.

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[1] For state law as to unlawful assembly, etc., see Code of Ala., Tit. 14, §§ 407 to 414. As to duties of governor and city authorities in case of riot, etc, see Code of Ala., §§ 374 to 378.

As to demonstrations at municipal airport, see § 8-24 of this Code. As to disorderly conduct generally, see ch. 16. As to police lines and check points, see §§ 41-22 to 41-25. [footnote in original]

§ 14-14. Authority to prohibit persons near jails, etc.

§ 14-15. Demonstrations in public buildings prohibited.

§ 14-16. Delegation of authority in absence of chief of police.

Sec. 14-1. Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section:

Police officer. Any member of the police department of the city or any member of the fire department of the city engaged in assisting policemen in police work, or any other person who, at the request of an officer of the city or of a policeman, is engaged in assisting policemen in police work.

Public place. Any public park, public building or other public place of the city.

Street. Any public street, public avenue, public road or public alley or sidewalk of the city.

Unlawful act. An act contrary to a law of the state or the city, punishable by fine or imprisonment or both.

Unlawful assembly. An assembly which is unlawful according to the common law of England, section 407, Title 14, Code of Alabama, or any other state act or statute. (Ord. No. 63-17, § 1.)

Sec. 14-2. Persons meeting to commit breach of the peace.

If two or more persons meet together in any street or public place to commit a breach of the peace or to do any unlawful act, each of them shall, on conviction, be punished as provided in section 1-6. (Ord. No. 63-17, § 2.)

Sec. 14-3 Persons meeting to violate city laws.

If three or more persons meet together in any street or public place upon a common cause to violate any provision of this Code or other ordinance of the city and make advances toward the violation thereof, they shall be deemed guilty of a riot and on conviction, shall be punished as provided in section 1-6. (Ord. No. 63-17, § 3.)

Sec. 14-4 Soliciting persons to participate in parades, processions etc.

It shall be unlawful for any person publicly to solicit persons to gather at any place for the purpose of engaging in a parade, procession or other public demonstration on the streets unless a permit for such parade, procession or other public demonstration has been previously secured as required by this Code or other ordinances of the city. (Ord. No. 63-17, § 4.)

Sec. 14-5. Obstructing free passage of streets.

It shall be unlawful for any person or number of persons to stand, loiter, walk or run upon any street so as to obstruct free passage thereon. (Ord. No. 63-17, § 5.)

Sec. 14-6. Refusal to move on after request by police officer.

It shall be unlawful for any person to stand or loiter upon any street after having been requested by any police officer to move on. (Ord. No. 63-17, § 5.)

Sec. 14-7. Lying prone on streets.

It shall be unlawful for any person participating in any demonstration to lie prone on any street or in any public place unless he does so because of sickness or physical incapacity. (Ord. No. 63-17, § 5.)

Sec. 14-8. Disturbing the peace while engaging in demonstrations.

It shall be unlawful for any person participating in any demonstration on any street or public place to shout, sing or engage in any boisterous conduct in such manner as to disturb the peace and tranquility of the community. (Ord. No. 63-17, § 6.)

Sec. 14-9. Demonstrations on sidewalks.

Those who participate in any demonstration on any sidewalk shall be spaced a distance of not less than ten feet apart. Not more than six persons shall demonstrate at any one time before the same place of business or public facility. (Ord. No. 63-17, § 7.)

Sec. 14-10. Duty of police to order dispersal of unlawful assemblies.

Where there is an unlawful assembly on any street or in any public place, it shall be the duty of any police officer present to command the persons comprising such unlawful assembly to disperse and retire peacefully to their respective abodes and businesses. If there is more than one such police officer present, the command shall be given by the superior officer or by one or more persons deputized by him to give the command. In no case shall it be necessary to use any set or particular form or words in ordering the dispersion of any unlawful assembly. Nor shall such command be necessary where the person in order to give it would necessarily be put in imminent danger of loss of life or great bodily harm, or where such unlawful assembly or riot is engaged in the commission or perpetration of a felony, or in assaulting or attacking any police officer, or is otherwise engaged

in actual violence to any person or property. (Ord. No. 63-17, § 8.)

Sec. 14.11. Failure to disperse from unlawful assembly.

It shall be unlawful for any person comprising a part of any unlawful assembly on any street or in any public place to, after being duly commanded to disperse as provided in section 14-10, wilfully and intentionally fail to do so. (Ord. No. 63-17, § 9.)

Sec. 14-12. Duty to retire from assembly when missiles thrown at police.

When any missile is thrown from an assembly at any police officer, every person in the assembly from which the missile is thrown immediately shall disperse or retire therefrom, without awaiting any order to do so. Any person who, knowing that a missile has been thrown from any such assembly, fails, without lawful excuse, to retire immediately from such assembly, shall, upon conviction be punished as provided in section 1-6. (Ord. No. 63-17, § 11.)

Sec. 14-14. Authority to prohibit persons near jails, etc.

The chief of police may, if he deems it advisable, prescribe a reasonable distance in the vicinity of any jail or other place where prisoners are held within which persons shall not come without the permission of the officer in charge of such jail or place. No person shall knowingly and wilfully, without lawful excuse, come within such limits without the aforesaid permission, or refuse to retire after being ordered to do so by a police officer. (Ord. No. 63-17, § 13.)

Sec. 14-15. Demonstrations in public buildings prohibited.

It shall be unlawful for any person to take part in or otherwise participate in any demonstration within any public building. (Ord. No. 63-17, § 14.)

Sec. 14-16. Delegation of authority in absence of chief of police.

In the absence of the chief of police from the police headquarters in the City Hall, the officer in command of headquarters in the absence of the chief of police shall have all authority conferred by any section of this chapter on the chief of police. In order to be absent within the meaning of this section, it shall not be necessary that the chief of police be absent from the city or that he be off duty. If he is not physically present in police headquarters, then that officer in command of police headquarters while the chief of police is not present therein shall have all authority conferred by this chapter on the chief of police. (Ord. No. 63-17, § 12.)

[Article II, "Permits for Parades and Public Demonstrations" §§ 14-17 through 14-20 (formerly § 1159), was found to be unconstitutional in *Shuttlesworth v. City of Birmingham*, 394 U. S. 147 (1969).]